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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 491

E. E. MORGAN,
Petitioner,

vs.

UNITED STATES FIDELITY AND GUARANTY COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

BRIEF OF RESPONDENT IN OPPOSITION

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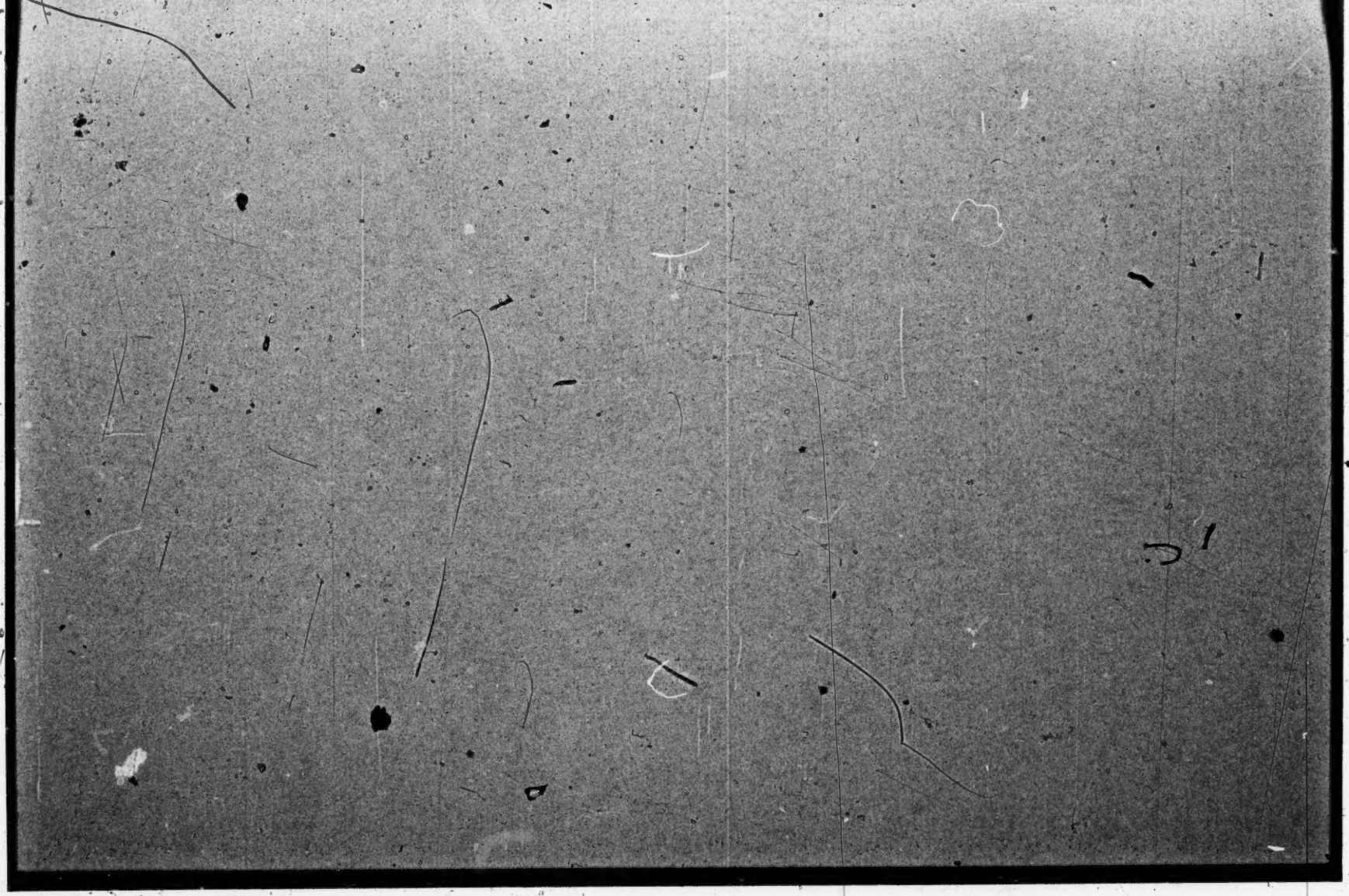

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NOTE: Unless otherwise indicated, emphasis in matter quoted in this brief has been supplied.

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BRIEF OF RESPONDENT IN OPPOSITION

OPINIONS BELOW

Respondent deems it necessary to correct certain omissions and inaccuracies in the petition concerning the opin-

ions below, and to refer to the opinion in a prior companion case ("the parent case"), in order that this Court may ascertain the grounds of the decree below.[1]

The present suit was brought to enforce a 1965 decree which had been affirmed by the Mississippi Supreme Court in 1966. The 1965 decree adjudicated that respondent, United States Fidelity and Guaranty Company (USF&G), is entitled to have petitioner Morgan specifically perform each and every obligation assumed by him under each of certain bond applications and indemnity agreements which he executed in favor of USF&G. In particular, the present suit sought to compel specific performance of Morgan's voluntary and express agreement to furnish to USF&G, upon request, financial statements showing his current financial position (R. 10).[2] The present suit was also in the nature of a judgment creditor's bill to obtain satisfaction of a money judgment against Morgan contained in that same 1965 decree.

The opinion of the trial court in the present case which is appended to the petition as Addendum A is not the opinion delivered upon the rendering of the decree sought to be reviewed, but is an opinion delivered in connection with a preliminary motion to require an answer to paragraph 8 of the bill of complaint. The opinions rendered in connection with the decree sought to be reviewed are not reported but appear in the certified record at pages 1134-1143, 1210-1211.

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1. The opinion of the Mississippi Supreme Court in the present case is reported as *E. E. Morgan* v. *United States Fidelity and Guaranty Company*, 222 So.2d 820 (Miss. 1969). A copy is attached to the petition as Addendum B. This opinion refers to the prior case as "the parent case." (Addendum B, p. A15). The opinion in the prior case is reported as *E. E. Morgan et al.* v. *United States Fidelity and Guaranty Company*, 191 So.2d 917 (Miss. 1966).

2. "R." references are to the certified record from the court below, "Pet." references are to the petition. "Pet. Addendum" references are to the addenda to the petition.

The decree of the Chancery Court in the present case is not reported, but the complete decree and all exhibits thereto appear in the record at pages 1145-1173. A copy (without exhibits) is attached to the petition as Addendum J.

JURISDICTION

Petitioner seeks to invoke jurisdiction under Title 28, U.S.C., § 1257(3), which relates to review by certiorari of final judgments of the highest court of a state.

Respondent submits that the judgment of the Mississippi Supreme Court, Addendum C to the petition, does not possess the requisite finality to support review by way of certiorari, since that judgment remands the case to the trial court for further judicial proceedings of a substantial nature and is not a final and effective disposition of all matters in controversy in the suit. The burden of establishing jurisdiction rests upon the petitioner, and any doubt as to the finality of the state court judgment should be resolved against jurisdiction. *Republic ~~National~~ Natural Gas Co.* v. *Oklahoma*, 334 U.S. 62, 71 (1948).

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions alleged to be involved are set forth in the petition at pages 3 and 4.

As hereinafter discussed in the argument, no constitutional provision or federal question was timely invoked as a defense to the claim for specific performance of Morgan's express agreement to furnish financial information.

QUESTIONS PRESENTED

Respondent takes issue with the statement of "Questions Presented" as formulated by petitioner. Accordingly, respondent restates the questions presented. Stated in the circumstances of this case, these questions are:

1. Petitioner Morgan is an experienced contractor and financier. In order to induce the respondent USF&G to bind itself as surety on performance and payment bonds that were required on numerous large construction projects in which petitioner Morgan was financially interested, Morgan executed bond applications and indemnity agreements whereby he voluntarily and specifically agreed to fully reimburse, protect, and indemnify USF&G against any loss whatsoever on account of its suretyship. He also expressly agreed to place USF&G in funds with which to pay claims, and to furnish to USF&G, upon request from time to time, financial statements showing his current financial position. Morgan withdrew large sums from these contracting operations as personal profits, but left numerous laborers and materialmen unpaid. USF&G called upon Morgan to perform his agreements, but he refused to do so and attempted to repudiate all of his agreements. As a result, USF&G was compelled to pay huge sums on account of its suretyship. USF&G brought suit [the parent case] against Morgan to enforce his agreements. In that suit the courts decreed that Morgan was obligated to perform specifically each and every obligation assumed by him under each of his agreements, and also awarded a money judgment in favor of USF&G. Nevertheless, Morgan persisted in his refusal to perform his obligations, refused to furnish financial statements, and attempted to place his assets beyond the reach of USF&G. Thereupon USF&G brought the present action.

The principal question is whether, under these circumstances, Morgan is entitled to invoke the Fifth Amendment as an excuse for refusing to furnish to USF&G written statements disclosing his assets and current financial position.

2. Stated differently, the question is whether the evidence is sufficient to support the Mississippi court's holding that, under the particular facts of this case, Morgan is bound to disclose his assets to USF&G and is precluded by waiver and estoppel from refusing to do so on the asserted ground of possible self-incrimination, the finding of waiver and estoppel being based on Morgan's voluntary and express agreements and his conduct that would make it unjust, inequitable and unconscionable to permit him to invoke the privilege as an excuse for refusing to furnish written statements disclosing his assets and current financial position.

3. Whether Morgan has waived the privilege by failure to timely invoke it as a defense to specific performance of his express agreement to furnish written statements showing his assets and current financial position.

4. Alternatively, if Morgan has not waived or is not estopped to invoke the privilege, whether Morgan is exposed to any real and substantial hazard of incrimination by merely furnishing written statements disclosing the nature, situation, description and character of his assets.

5. Where a receiver is appointed to enforce a prior decree and overcome fraudulent actions of a recalcitrant defendant, does the Constitution require that the receiver be a completely disinterested person, or may the court, in the exercise of its discretion, select as receiver a well qualified former employee of the creditor, who is familiar with the intricate facts involved, who is required to post adequate bond, and who will act under the supervision of the court in enforcing the decree?

STATEMENT OF THE CASE

This case was decided on the special facts and circumstances reflected by the record. The decision of the court below is not a mere holding that there was a technical "waiver" of the privilege by contract. The court below has applied basic principles of *estoppel* in holding that Morgan is precluded from asserting the privilege (Pet. Addendum B, pp. A26, A33).

The petition studiously avoids coming to grips with the facts which create an estoppel. Furthermore, the petition incorrectly describes the relief granted by the decree below. Contrary to petitioner's repeated assertions, the decree does not direct any "sweeping testimonial discovery under oath." (Pet. p. 19). The decree merely directs the furnishing of written statements showing certain specified information concerning Morgan's current financial position. The decree does not specify that these statements be under oath.

Since an understanding of the facts is essential, we briefly restate the facts.

Some of the background of the present case appears in the opinion of the Mississippi Supreme Court affirming the 1965 Chancery Court decree in the parent case. *Morgan* v. *USF&G*, 191 So.2d 917 (Miss. 1966).

As shown in that decision, R. W. Hyde, Jr. was an experienced contractor who had engaged in the contracting business for many years. Petitioner Morgan was an experienced contractor who had considerable financial resources and was experienced in financing various types of transactions (191 So.2d at 919).

Hyde wanted to expand his business and take on more and larger contracts, but did not have sufficient financial

standing and assets to enable him to obtain the necessary surety bonds for more and larger jobs. Accordingly, in order to increase their bonding capacity and enable them to take on more and larger jobs, Morgan and Hyde became partners and associates in the contracting business so as to add Morgan's assets and financial resources to those of Hyde (191 So.2d at 919).

Thereafter, by means of bond applications and indemnity agreements, Morgan and Hyde were able to induce USF&G to become surety on the performance and payment bonds that were required of Morgan and Hyde in connection with the numerous larger projects (191 So.2d at 919).

USF&G began writing bonds for Morgan and Hyde in 1958. In connection with these bond applications and indemnity agreements, Morgan furnished USF&G with his financial statements for the years 1956, 1957, and 1958 (R. 812-826). Each of these statements shows that Morgan had a personal net worth substantially in excess of $3,000,000.00.

In every instance, USF&G acted in reliance on the representation and agreement that the *combined* net worth and *combined* assets of Morgan and Hyde were bound and would be available for the protection and indemnification of USF&G. These representations and agreements induced USF&G to write surety bonds on numerous construction projects involving many millions of dollars (191 So.2d at 919, 923).

In regard to each and every bond, Morgan voluntarily and specifically bound himself to protect, reimburse, indemnify and exonerate USF&G from any loss whatsoever on account of its suretyship. He also expressly agreed to place USF&G in funds with which to pay creditors on the projects (191 So.2d at 923; R. 799, Ex. C-15).

All of the agreements provided that they were binding on Morgan, his heirs, successors and assigns, and that the agreements should be "liberally construed" in favor of USF&G.

In connection with a large project in Shively, Kentucky, Morgan expressly, specifically and personally bound himself to furnish USF&G financial statements showing his current financial position, when requested to do so. The Shively application provided that each applicant would:

> "furnish to Sureties, upon request and at such reasonable intervals of time as sureties may designate, financial statements showing the current financial position of the applicant of whom such request for a statement is made." (R. 7-8).

The Shively application also provided that it should be "liberally construed so as to fully protect and indemnify" USF&G.

In order to induce USF&G to become surety on the Shively project, Morgan not only signed a printed form of indemnity agreement, but he also wrote and personally signed a letter in which he individually bound himself to all the terms and conditions of the Shively application "just as though I were named as one of the applicants therein and my signature were duly affixed thereto." (R. 799, Ex. C-15).

This letter is quoted in full in the opinion of the Mississippi Supreme Court (Pet. Addendum B, p. A32).

All of these agreements were signed by Morgan in order to pledge his assets to the indemnification of USF&G so as to induce USF&G to become surety. The very purpose of Morgan's business association with Hyde was to induce USF&G to become surety (191 So.2d at 919). In every instance USF&G *acted in reliance upon* Morgan's uncondi-

tional representation and agreement that his assets would be available for the protection and indemnification of USF&G (191 So.2d at 923).

From these contracting operations, Morgan withdrew more than $500,000 in cash, plus $316,000 in notes, which he still retains as profits from this venture (191 So.2d at 919). Yet when claimants on the projects began making demand for payment, Morgan not only refused to pay them, but he refused to place USF&G in funds with which to pay them, and he further refused to furnish USF&G with statements showing his financial position. USF&G made repeated requests for such financial statements prior to obtaining the 1965 adjudication against Morgan. Morgan has still not furnished such statements.

Consequently, USF&G was required to pay out vast sums and to resort to litigation in an effort to compel Morgan to do that which he had voluntarily agreed to do. USF&G brought suit against Morgan and Hyde and certain corporations controlled by them, and recovered a final decree on July 23, 1965. The 1965 decree expressly adjudicated that Morgan and the other defendants were obligated "to perform specifically each and every obligation assumed by them under the terms of each of the various bond applications and indemnity agreements signed by them." (R. 18). This 1965 decree also awarded money judgments in various amounts against the several defendants.

Hyde and his corporations admitted liability and did not appeal from the 1965 decree. Morgan and his corporations did appeal, but the Mississippi Supreme Court held that there was no merit in the appeal and unconditionally affirmed the 1965 decree (191 So.2d at 917, 924). Hyde made a full disclosure of his assets to USF&G. However, Hyde had no substantial assets, because Morgan had previ-

ously taken over virtually all of Hyde's assets (R. 1128).[3] Morgan, on the other hand, continued a deliberate course of conduct designed to place his assets beyond the reach of USF&G (R. 1136).

For a time, Morgan absented or concealed himself so that he could not be served with process.

After Morgan returned to Mississippi and could be served with process, in January 1967, USF&G filed the present suit (1) to enforce the prior decree of July 23, 1965; (2) to enforce specific performance of Morgan's agreement to furnish USF&G with financial statements showing his current financial position; (3) to compel Morgan to disclose his assets; and (4) to obtain other equitable relief, including the appointment of a receiver (R. 6-30).

Paragraphs 3 through 7 of the present complaint related solely to the enforcement of the prior decree and the compelling of specific performance of Morgan's obligation to furnish financial statements showing his current financial position (R. 6-10). Morgan did *not* invoke the privilege against self-incrimination as a purported defense to this part of the complaint. He merely denied that he was required to furnish such financial information, contending that specific performance had been denied in the prior case and that such denial was *res judicata* (R. 520-524 and 48-52).

The next paragraph of the complaint, paragraph 8, averred that Morgan had concealed substantial assets and resorted to other devices for the purpose of hindering, delaying and defrauding USF&G of its rights as a judgment creditor (R. 11). Morgan's answers did invoke the priv-

3. The opinion of the Mississippi Supreme Court states: "Hyde surrendered all assets which had not been taken over by appellant [Morgan]." (Pet. Addendum, B, p. A21, footnote).

ilege as to a portion of paragraph 8 of the complaint (R. 524-525, 628-629).

A preliminary hearing was held to determine the claim of privilege. The Chancery Court ruled that Morgan was bound by contract to inform USF&G of the "nature, value, amounts, and whereabouts of his assets" and that he was estopped to refuse to make such disclosure (R. 646, 640-641, Pet. Addendum A, pp. A12 and A8). However, the Chancellor also ruled that Morgan would not be required to answer those particular averments of paragraph 8 of the complaint which charged him with concealment of assets and other fraudulent devices (R. 646-647, 649-651, Pet. Addendum A, pp. A12-A13).

Subsequently, the case was tried on the merits. Morgan could not be found for service of a subpoena and did not appear or testify. USF&G presented detailed evidence which strongly indicates that Morgan owns or controls several million dollars worth of liquid assets, consisting of cash, bearer bonds and negotiable securities—assets that are easy to conceal and difficult to find. The uncontradicted proof showed that, despite diligent efforts, USF&G had been unable to locate any substantial assets of Morgan.

At the conclusion of the trial, on August 7, 1967, the Chancery Court entered a final decree in favor of USF&G (R. 1045-1173, Pet. Addendum J). Paragraphs 6 and 7 of this decree adjudicated that USF&G was entitled to have Morgan specifically perform his agreements and directed Morgan to furnish USF&G with financial statements in a specified form and a written statement showing certain specified information in regard to his assets and current financial position.

The decree also appointed a general receiver to demand, collect and receive all of the assets of Morgan for the purpose of enforcing compliance with the 1965 decree.

After the final decree had been entered, Morgan filed "Exceptions to Final Decree" (R. 1181-1184, Pet. Addendum J). Among other things, Morgan sought to invoke the privilege as to paragraphs 6 and 7 of the decree. As stated above, Morgan's pleadings had not previously invoked the privilege as a defense to enforcement of the prior decree and specific performance of his obligation to furnish financial information. After hearing, the exceptions were overruled (R. 1186).

Pending appeal to the Mississippi Supreme Court, Morgan obtained a stay of paragraphs 6 and 7 of the decree (R. 1187).

On appeal, on April 14, 1969, the Mississippi Supreme Court affirmed the decree of the Chancery Court in all respects and remanded the cause to the Chancery Court for "further proceedings in accordance with that Court's aforesaid decree of August 7, 1967." (Pet. Addendum C, pp. A37-A38).

Rehearing was denied on June 9, 1969.

On June 24, 1969, Morgan obtained from the court below a further stay of the enforcement of paragraphs 6 and 7 of the decree, pending the filing of a petition for certiorari in this Court.

SUMMARY OF ARGUMENT

I.

A. The Court below has held that under the particular facts of this case, Morgan is barred and precluded from asserting the privilege against self-incrimination as an excuse for refusing to furnish to USF&G written statements disclosing his assets and financial position, as he had expressly and unconditionally bound himself to do.

This holding is based upon *all* the facts of this case, including Morgan's specific agreements and his affirmative acts and conduct which make invocation of the privilege unconscionable.

The decision below does not turn upon a finding that there has been a technical "waiver" by contract. Instead, the court below has applied basic principles of estoppel and waiver announced in numerous prior decisions of this Court.

Estoppel and waiver have often been applied by this Court to bar inequitable assertion of constitutional rights in civil cases. Estoppel or waiver may result from a deliberate election, or from a course of conduct inconsistent with the assertion of the right and rendering it unjust and inequitable to permit assertion of the constitutional right or privilege. *Shepard* v. *Barron*, 194 U.S. 553, 565, 568. Furthermore, estoppel or waiver may be applied to bar any constitutional right or privilege which is intended for the personal benefit or protection of the person as to whom the estoppel or waiver is claimed. Since the privilege against self-incrimination is a purely personal privilege intended for the sole benefit of the individual, it is subject to estoppel and waiver.

This Court has expressly held that rights under the Fourth and Fifth Amendments may be waived by a prior

contractual undertaking to furnish information, and the principles of that decision are applicable here. See *Zap v. U. S.*, 328 U.S. 624 (1946).

B. In addition to the estoppel and waiver discussed above, Morgan has waived the privilege by failure to timely invoke it as a defense to specific performance. The decree below enforces specific performance of Morgan's express agreement to furnish financial statements showing his current financial position. Morgan never invoked the privilege as an alleged defense to this relief until after rendition of a final decree. Failure to specifically invoke the privilege prior to final decree is deemed a waiver. *United States ex rel. Vajtauer v. Com'r of Immigration*, 273 U.S. 103, 113 (1927).

C. Although the court below found it unnecessary to discuss this point, the decree below is correct for the additional reason that Morgan is not exposed to any "real and appreciable" hazard of self-incrimination by merely furnishing written statements disclosing the amount, nature, description, and situation of his assets. At most, Morgan merely shows a remote and barely possible contingency that should not be suffered to obstruct the administration of civil justice.

D. In proceedings in the nature of a judgment creditor's bill, the appointment of a receiver is customary and almost a matter of course. Where the proceeding seeks to overcome wrongful actions by a judgment debtor and to recover property that has been wrongfully transferred or concealed, it is not necessary that the receiver be a neutral or indifferent party. The court, in the exercise of its discretion, may appoint a competent and qualified agent of the creditor, who is familiar with the facts of the matter and is required to act under the supervision of the court in enforcing the decree.

II.

The decision below is in full accord with prior decisions of this Court. The cases relied upon by petitioner are readily distinguishable. None of them involved express and unconditional agreements of the type that are involved here. None of them involved affirmative acts and the other elements of estoppel that are present here.

ARGUMENT

The decision in this case is based on the peculiar and unique facts involved, the lower court has correctly decided the issues, and no amount of twisting and distorting can convert this case into one warranting review by this Court on certiorari. The alleged federal questions raised by petitioner have been decided in full accord with the applicable decisions of this Court.

The petition seeks to leave the impression that this is purely and simply a case in which a party has recovered a money judgment and then sought to enforce the judgment by post-judgment proceedings charging the other party with a crime. That argument is incorrect and misleading.

This is an unusual civil case involving the orderly enforcement of a prior judicial decree for specific performance and the fair administration of justice between private litigants. The present case involves special facts and circumstances that make invocation of the privilege unconscionable. As stated by the Mississippi Supreme Court, "The peculiar facts of this case are of particular import in considering the [claim of privilege]." (Pet. Addendum B, p. A26).

Contrary to Morgan's repeated assertions, the decision below is not based upon any alleged doubt as to the

applicability of the privilege in civil cases. Likewise, the decision is not based upon the ground that recognition of the privilege would impair what Morgan calls the court's "collection powers." Morgan's argument to that effect is a rank distortion of the court's opinion. That is obviously not the basis of the decision below, and a reading of the opinion will readily so demonstrate.

The court below was fully apprised of the governing federal law and based its decision on the facts of this case and the principles of estoppel and waiver established by prior decisions of this Court.

As heretofore shown, the background of the case is of utmost importance. Likewise, the particular relief sought and the particular relief actually granted are important.

Contrary to Morgan's assertions, the judgment of the court below does not involve any "interrogation" of petitioner. The court below has merely directed Morgan to furnish written statements disclosing information concerning his financial position. The decree does not even specify that these written statements be made under oath. The decree simply enforces the substantive property rights of USF&G which are derived from the voluntary and express agreements of Morgan and the court's prior adjudication that Morgan is bound to specifically perform his agreements.

As hereinafter discussed, the decision of the court below is clearly correct, is firmly supported by abundant authority, and accords with every principle of right, justice and fairness.

I.

The Decision Below Is Clearly Correct.

A. Petitioner Has Waived and Is Estopped to Assert the Privilege Because of His Voluntary Agreements and Course of Conduct.

The court below has correctly held that Morgan has waived and is estopped to claim the privilege as an excuse for refusing to disclose his assets to USF&G.

A landmark decision on the scope of the privilege in civil cases is *Brown* v. *U. S.*, 356 U.S. 148 (1958). There, this Court held that in *civil cases* the privilege is subject to limitations and that considerations of justice and fairness prevail in determining its scope and limits.

In *Brown*, the defendant had taken the stand in a civil case and testified on direct examination, but refused to answer relevant questions on cross-examination, invoking the privilege against self-incrimination. Although there was no express or intentional waiver of the privilege, this Court applied a rule of constructive waiver and rejected the claim of privilege. The Court stressed the unfairness and injustice to the other litigant and to the court that would result if the defendant were permitted to invoke the privilege. The Court said:

> "The interests of the other party and regard for the function of courts of justice to ascertain the truth become relevant, and prevail in the balance of considerations determining the *scope* and *limits* of the privilege against self-incrimination. . . ." (356 U.S. at 156).

In connection with the statement quoted above, the Court further said that indirect sanctions, such as striking the party's testimony, must often in practice be a poor

substitute for searching cross-examination. 356 U.S. at 156, note 5.

Thus, in *Brown*, this Court emphasized the importance of the fair administration of justice between civil litigants.

In the instant case, the Mississippi court has likewise stressed the public interest in subserving justice between private litigants. The Mississippi court said:

> " 'The interest of the general public in the fair adjudication by courts of civil disputes between citizens ranks very high in the American polity.' "[4]

In his petition, Morgan asserts that the decree required that he disclose his assets and that he transfer all of his assets to the receiver—that since he has executed an instrument conveying some property to the receiver, he may be subject to contempt proceedings if he discloses assets that he has not transferred to the receiver. Certainly there is no merit in this contention. The decree ordered *both* a disclosure of assets and a conveyance of assets. Morgan is not free to select one requirement of the decree, execute a document which is purportedly in compliance therewith, and then contend that, since the document he executed may be false, he cannot be required to perform the other requirements of the decree. We submit that a mere statement of this contention demonstrates its fallacy.

In the present case the Mississippi court has applied the firmly established rule that in civil cases constitutional rights may be waived or lost by estoppel. In accordance with settled law, the court below has held that the waiver or estoppel may be found because of an agree-

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4. Pet. Addendum B, p. A27, quoting *Duratron Corp.* v. *Republic Stuyvesant Corp. et al.*, (N.J. Super., 1967) 231 A.2d 854, 857, cert. den. by N.J. Sup. Ct. Nov. 14, 1967, 235 A.2d 897.

ment or because of a course of conduct that indicates an intention to forego the privilege. This holding is fully supported by the applicable decisions of this Court and the lower federal courts.

Thus in *Ralston* v. *Cox*, 123 F.2d 196, 198 (C.A. 5, 1941), cert. denied 315 U.S. 796, the court said:

> "If constitutional rights may be waived, *as is well settled*, they are also subject to the legal principles of *estoppel*. . . ."

Estoppel is particularly applicable when a litigant has so acted as to preclude him from asserting the right, that is, when to permit assertion of the right would give the litigant some undue advantage or result in wrong or injury to someone else.[5]

The Mississippi court has found that under the facts of the present case, recognition of the privilege would be unconscionable.

The Mississippi court has expressly relied on the principles announced in the leading case of *Shepard* v. *Barron*, 194 U.S. 553 (1904). In *Shepard* v. *Barron* this Court held that certain property owners had waived or were estopped to assert a denial of due process of law. The Mississippi court quoted from *Shepard* as follows:

> "Provisions of a constitutional nature, intended for the protection of the property owner, may be waived by him, not only by an instrument in writing, upon a good consideration, signed by him, but also by a course of conduct which shows an intention to waive such provision, and where it would be unjust to others to permit it to be set up. * * * 194 U.S. at 568, 24 S.Ct. at 742, 48 L.Ed. at 1120-21.
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> * * *

5. This Court has said that estoppel is based on the maxim that "no man may take advantage of his own wrong." *Glus* v. *Brooklyn Eastern District Terminal*, 359 U.S. 231, 232 (1959) (estoppel barring inequitable reliance on statute of limitations).

> ". . . A defense of this nature and upon these facts need not be placed entirely upon the strict and technical principles of an estoppel. While it partakes very strongly of that character, it also assumes the nature of a contract, implied from the facts * * *. It does not in the least matter what we may call the defense, whether it be estoppel or implied contract, or one partaking of the nature of both * * *." 194 U.S. at 565, 24 S.Ct. at 741, 48 L.Ed. at 1119 (Pet. Addendum B, p. A33).

In view of *Shepard* v. *Barron*, even Morgan is forced to concede that constitutional privileges may be lost by estoppel (Pet. p. 22). Morgan attempts to distinguish that case on the sole ground that it involved "affirmative acts" of the party and a constitutional provision protecting property rights, rather than the privilege against self-incrimination. We submit that the attempted distinction wholly fails.

Insofar as "affirmative acts" are concerned, the present case against Morgan is as strong a case as could exist. Morgan's agreements and representations are in writing and the facts are undisputed. Furthermore, as hereinafter shown, the vital principles of estoppel are clearly applicable to the purely personal privilege that Morgan inequitably seeks to invoke here.

This Court has often applied the principles of estoppel to bar inequitable assertion of constitutional rights. For example, in *Pierce Oil Corp.* v. *Phoenix Refining Co.*, 259 U.S. 125, 128, 129 (1922), involving an alleged denial of due process, the Court said:

> "There is nothing in the nature of such a constitutional right as is here asserted to prevent its being waived or the right to claim it barred, as other rights may be, by deliberate election or by conduct inconsistent with the assertion of such a right. . . ."

Likewise, in *Wall* v. *Parrott Silver & Copper Co.*, 244 U.S. 407, 412 (1917), in rejecting a claim that due process and equal protection of the laws had been denied, this Court said:

> ". . . There is no sanctity in such a claim of constitutional right as prevents its being waived as any other claim of right may be."

These cases announce a basic principle of constitutional law which is applicable to any constitutional right or privilege which is intended for the personal benefit or protection of the person as to whom the waiver or estoppel is claimed.[6] It is well settled that the privilege against self-incrimination is purely a personal privilege given to the individual solely for his own benefit. *Rogers* v. *U. S.*, 340 U.S. 367, 371 (1951); *Campbell Painting Corp.* v. *Reid*, 392 U.S. 286, 288 (1968). It necessarily follows that in civil cases the privilege may be waived or lost by estoppel.

We respectfully submit that there is nothing whatsoever in the nature of the personal privilege here asserted which would prevent its being waived, or the right to claim it barred, as other constitutional rights may be, by voluntary agreement or by conduct creating an estoppel.

It has never been doubted that the privilege against self-incrimination, like all other personal privileges, may be waived. Dean Wigmore states that the privilege may be waived by prior contract, and that *"This has been the doctrine since the origin of the privilege." Wigmore, Evi-*

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6. The cases are collected and the rule summarized in 16 C.J.S., *Constitutional Law*, § 89, p. 264, where it is stated:

> "Except when expressly prohibited by statute, *the right to assert a constitutional right or to challenge the constitutionality of a statute may be lost by waiver or estoppel if the constitutional right or provision involved is one which was made for the benefit or protection of the person as to whom the waiver or estoppel is claimed. . . .*" (p. 264).

dence (3rd Ed. 1940), § 2275, p. 435; and (1st Ed. 1904-1905), § 2275, pp. 3150-3151.

This Court has expressly held that constitutional rights under the Fourth and Fifth Amendments may be waived by prior contract. *Zap* v. *U. S.*, 328 U.S. 624 (1946), discussed *infra*. Similarly, the constitutional right of free speech that is involved in the right to strike and picket may be waived by a voluntary collective bargaining agreement containing a "no-strike" clause. *Alabama Cartage Co.* v. *International Brotherhood of Teamsters, etc.*, 250 Ala. 372, 34 So.2d 576, 579 (1948); *Shirley-Herman Co.* v. *International Hod Carriers, etc.*, 182 F.2d 806, 809 (C.A. 2d, 1950).

A highly pertinent decision of this Court is *Zap* v. *U. S.*, 328 U.S. 624 (1946).[7] In accordance with the rule that a person may waive constitutional provisions made for his own personal benefit, the *Zap* case holds that constitutional rights under the Fourth and Fifth Amendments may be waived by prior contract, even in a criminal case. In the present case the Mississippi court has stated that *Zap* involved a "strikingly similar situation." (Pet. Addendum B, p. A30).

In *Zap*, a contractor, in order to obtain business from the government, specifically agreed to permit inspection of his accounts and records. This Court held that *by making this agreement*, the contractor voluntarily waived any constitutional claim to privacy or immunity which he otherwise might have had with respect to business documents related to the contract. The agreement in *Zap* did not use the word "waive" and contained no reference whatsoever

7. Rehearing denied 329 U.S. 824, vacated on other grounds 330 U.S. 800. The "other ground" on which the decision was vacated was the absence of women on the grand jury which returned the indictment.

to either the 4th or 5th Amendments. Nevertheless, this Court found a "waiver" of those provisions. In *Zap*, Mr. Justice Douglas said:

> ". . . And petitioner's contract with the Navy Department provided: 'The accounts and records of the contractor shall be open at all times to the Government and its representatives, and such statements and returns relative to costs shall be made as may be directed by the Government.' (328 U.S. at 627).
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> * * *
>
> "As we have pointed out in Davis v. United States, No. 404, decided this day, *the law of searches and seizures as revealed in the decisions of this Court is the product of the interplay of the Fourth and Fifth Amendments. But those rights may be waived.* And when petitioner, in order to obtain the government's business, *specifically agreed to permit inspection of his accounts and records, he voluntarily waived* such claim to privacy which he otherwise might have had as respects business documents related to those contracts. . . . (328 U.S. at 628).
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> * * *
>
> ". . . *The waiver of such rights to privacy and to immunity as petitioner had respecting this business undertaking for the Government made admissible in evidence all the incriminating facts.*" (328 U.S. at 630).

To paraphrase the *Zap* case, we submit that when Morgan, in order to induce USF&G to become his surety, specifically agreed to indemnify USF&G, to place USF&G in funds with which to pay claims, and also specifically agreed to furnish financial statements showing his assets and current financial position, *he voluntarily waived any constitutional right to privacy or immunity which he otherwise might have had with respect to his assets and financial resources.*

As he did in the court below, Morgan continues to assert that *Zap* is based on the "required records" doctrine. This is simply not so. The plain language of the *Zap* decision makes it crystal clear that the holding is *not* based upon the "required records" doctrine. As shown by the above quotation, in *Zap* the Court emphasized that when the petitioner "specifically agreed" to permit inspection of his records, "he voluntarily waived" any claim to privacy and immunity (328 U.S. at 628). In the quoted statement the Court emphasized the *specific agreement* of the defendant and his *voluntary waiver;* and did not even mention the fact that any records were required to be kept.

Furthermore, if *Zap* had in fact been based on the "required records" doctrine, the Court could have disposed of the matter quite easily by merely citing *Wilson* v. *U. S.*, 221 U.S. 361, 380 (1911), a leading case on the "required records" doctrine. Instead, the Court deliberately stressed the specific agreement of the defendant. There can be no doubt that the author of the *Zap* decision was thoroughly cognizant of the *Wilson* case, because, in another decision handed down on the same day as the *Zap* case, that same Justice had cited and quoted that part of the opinion in *Wilson* that deals with the "required records" doctrine. See *Davis* v. *U. S.*, 328 U.S. 582, 589, 590 (1946).

Contrary to Morgan's argument, the principle of the *Zap* case is not confined to contracts with the government, but extends to any voluntary agreement which a person makes in order to induce another party to enter into a business contract with him. In *Zap*, the Court found a waiver because the defendant voluntarily signed a contract in order to obtain some business. There is nothing in *Zap* to indicate that a different result would have been

reached if the contract had been between two private individuals, and there certainly is no reason for making any such distinction.

We submit therefore that the *Zap* case is decisive on the question of waiver and estoppel.

It makes no difference whether the applicable principle be called estoppel, waiver, or express or implied contract. *Shepard* v. *Barron*, 194 U.S. at 568. All of these doctrines are used to denote the termination, preclusion, or loss of rights which a party might otherwise have had but for his actions.

If a party to a transaction induces another to act on a reasonable belief that he has waived or will waive certain rights, he will be estopped to insist on such rights to the prejudice of the one misled. *U. S. for Use and Benefit of Noland Co.* v. *Wood*, 99 F.2d 80, 83 (C.A. 4, 1938); *Glus* v. *Brooklyn Eastern District Terminal*, 359 U.S. 231, 232-234 (1959).

Similar reasoning was applied by Chief Justice Traynor of the California Supreme Court in holding that a privilege against disclosure may be waived by a prior contractual undertaking to furnish information upon request. *Crest Catering Company* v. *Superior Court*, 62 Cal.2d 274, 398 P.2d 150 (1965).[8]

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8. In *Crest* an employer had contracted to "furnish all necessary information" in regard to a welfare fund. The administrator of the fund sought disclosure of certain employment tax returns. By specific statute, these returns were privileged and immune from discovery. In holding that the privilege had been waived, the court said:

> "Crest contends that the foregoing provisions do not waive the privilege because there is no specific reference either to the code provisions creating the privilege or to the tax returns. *A waiver does not depend upon meeting such a brittle requirement.* . . .
>
> *"A waiver may occur (1) by an intentional relinquishment or (2) as 'the result of an act which, according to its natural import, is so inconsistent with an intent to enforce the right as to induce a reasonable belief that such right has been relinquished* . . ." (398 P.2d at 152).

We submit that the Mississippi court has correctly applied the rules of waiver and estoppel announced in prior decisions of this Court.

B. Morgan Has Waived the Privilege by Failure to Timely Invoke It As a Defense to Specific Performance of His Agreement to Furnish Financial Information.

In addition to the waiver and estoppel resulting from his affirmative acts and conduct, Morgan has waived the privilege by failure to timely invoke it as a defense to specific performance of his agreement to furnish financial information upon request.

As heretofore shown, it is undisputed that USF&G acted in reliance on the financial statements that Morgan voluntarily furnished to it and in reliance upon Morgan's unconditional agreements that his assets were bound for the protection and indemnification of USF&G.

It is likewise undisputed that Morgan has specifically *and unconditionally agreed to furnish USF&G with financial* statements showing his current financial position, when requested to do so. Morgan has also expressly agreed that this obligation shall be liberally construed. In the prior case, long before any claim of self-incrimination was ever mentioned by Morgan, the Mississippi Supreme Court adjudicated that this agreement is a valid and binding obligation which Morgan is bound to perform specifically. Morgan did not seek further review of the prior decision, and that adjudication has long since become final.

In the present case, Morgan's answers did *not* invoke the privilege as a defense to specific performance of this agreement. Morgan only pleaded *res judicata*, and the court below has correctly overruled that contention. At

no time prior to the entry of a final decree did Morgan ever invoke the privilege as a defense to the claim for specific performance.

The Chancery Court ruled that Morgan was under a contractual duty to make a written disclosure of the nature, value, amount, and whereabouts of his assets, and that whether this was done by way of discovery or by way of specific performance mattered very little (R. 1140).

On August 7, 1967, the Chancery Court entered its final decree. The only provisions of this decree that require Morgan to furnish any information are paragraphs 6 and 7 (Pet. Addendum J, p. A53). These paragraphs merely require that Morgan furnish to USF&G a financial statement in a specified form and a written statement showing the identity, status, location and custody of his assets. In order to be truly meaningful and actually disclose a party's current financial position, a financial statement must disclose full and correct information concerning the amount, nature, status, location and custody of his assets. USF&G therefore submits that paragraphs 6 and 7 of the decree merely constitute a grant of specific performance of Morgan's voluntary and express covenant to furnish financial statements and information correctly showing his current financial position.

After the final decree had been entered on August 7, 1967, Morgan filed exceptions to the final decree (R. 1181-1184, Pet. Addendum E), and thereby sought to invoke the privilege as an excuse for refusing to comply with the requirements of paragraphs 6 and 7 of the decree. USF&G submits that Morgan did not timely invoke the privilege as a defense to the relief granted in these paragraphs. Accordingly, Morgan is deemed to have waived the privilege. It is well settled that failure to specifically invoke the privilege prior to final judgment constitutes a waiver. *United*

States ex rel. Vajtauer v. *Commissioner of Immigration*, 273 U.S. 103, 113 (1927); *United States* v. *Murdock*, 284 U.S. 141, 148 (1931).

For this additional reason, the decision below is clearly correct and the petition should be denied.

C. Compliance with the Decree Does Not Involve Any Real or Substantial Hazard of Incrimination.

In recent decisions, this Court has repeatedly recognized that the "central standard" for the application of the privilege is whether the person claiming the privilege is "confronted by substantial and 'real' and not merely trifling or imaginary, hazards of incrimination." The privilege cannot be invoked unless the claimant is confronted by "substantial hazards of self-incrimination." *Marchetti* v. *U. S.*, 390 U.S. 39, 53, 61 (1968).

In the present case, the Mississippi court recognized the foregoing principles but ruled that it was not necessary to reach this question, because Morgan was precluded from invoking the privilege on account of waiver and estoppel. We submit, however, that the judgment below is correct for the reason that compliance with the decree does not involve any real or appreciable hazard of self-incrimination.

The only information that Morgan has been directed to furnish concerns the identity, status, location, and custody of his assets and property. From an early day, the courts have recognized that it is hardly imaginable that a party could be exposed to any real hazard of incrimination by merely disclosing the amount, nature, situation, description and character of his assets. *Bay State Iron Co.* v. *Goodall*, 39 N.H. 223, 235 (1859).

Kirtley v. *Abrams*, 184 F. Supp. 65 (USDC N.Y. 1960), involved a proceeding to discover and locate a judgment

debtor's assets. In rejecting a claim of privilege, the court pointed out that the defendant was not appearing before a grand jury, that no prosecutor or criminal investigation was involved, and that the constitutional protection "is confined to real danger, and does not extend to remote possibilities out of the ordinary course of law." The court emphasized that the activities of the judgment creditor were confined to a search for assets of the debtor for the purpose of satisfying the judgment. Applying the federal standards governing the privilege, the court concluded that the defendant was not confronted with any real and substantial hazard of self-incrimination.

The purpose of the present suit is not to compel Morgan to furnish incriminating evidence against himself in a criminal case, present or future, but to compel him to disclose assets that he has voluntarily and specifically bound himself to disclose. In the setting of the present civil case, Morgan is not exposed to any real or substantial danger of incrimination by merely making a written disclosure of his assets.

> "A merely remote and naked possibility . . . should not be suffered to obstruct the administration of justice." *Brown* v. *Walker*, 161 U.S. 591, 599, 600 (1861), quoting *Regina* v. *Boyes*, 1 Best & S. 311, 121 Eng. Reprint 730, 738.

D. The Appointment of the Receiver Was Correct and Proper. No Federal Question Is Presented by the Receivership.

Petitioner makes no serious effort to show that the receivership was erroneous and cites no authorities whatsoever on this point.[9] The opinion of the Mississippi Su-

9. In the court below, petitioner virtually abandoned any objection to the receivership. In one of his briefs on application for rehearing, petitioner stated:

> "Quite frankly, it is a matter of no great concern to appellant whether the Court places its stamp of approval on the receivership as presently constituted or not."

preme Court shows that no federal question in regard to the receivership was urged before or decided by that court. That opinion further shows that Morgan did not even present any persuasive authority to support his argument that the receiver should be a completely disinterested party. In expressly rejecting that contention, the court said:

> ". . . We note a lack of convincing authority to this effect." (Pet. Addendum B, p. A35).

Under all the authorities, the receivership was correct and proper. "The appointment of a receiver in proceedings upon a creditor's bill is a usual practice and is almost a matter of course when the object of the bill is to reach personal assets." 21 Am. Jur. 2d, *Creditors' Bills*, §90, p. 61; *Pittsburgh Equitable Meter Co.* v. *Paul C. Loeber & Co.*, 160 F.2d 721, 728 (C.A. 7, 1947).

In many cases it is absolutely necessary "for the Court to appoint a receiver to preserve, realize, administer or otherwise to appropriate the defendant's property to the satisfaction of complainant's judgment" or to take action to recover property which the defendant has "improperly encumbered, transferred, or alienated." *Clark on Receivers* (3rd Ed. 1959), §211, p. 323.

When a judgment debtor wrongfully conceals his property for the purpose of evading a prior decree, the receiver is not supposed to be indifferent or neutral, but his duty requires him to be the active adversary of the debtor. *Shainwald* v. *Lewis*, 8 Fed. 878, 879 (D.C. Cal. 1881), affirmed 48 Fed. 492 (C.C. Cal. 1881); *Clark on Receivers* (3rd Ed. 1959), § 115(a), pp. 167, 168; *Cahall* v. *Lofland*, 12 Del. Ch. 125, 107 A. 769 (1919).

In cases such as the present, the receiver is not appointed merely to preserve property *pendente lite*, but to recover and appropriate property. Accordingly, it is en-

tirely proper for the judgment creditor or his agent to be appointed as receiver. Likewise, it is proper for the receiver to engage the complainant's solicitor as his counsel. *Clark on Receivers* (3rd Ed. 1959) § 115(a), pp. 167-168; *Shainwald* v. *Lewis, supra*; *McPherson* v. *United States*, 245 Fed. 35, 41 (C.A. 6, 1917); *J. C. Turner Lumber Co.* v. *Toomer*, 275 Fed. 678, 680 (C.A. 5, 1921); *Boyd* v. *Brown*, 79 Colo. 568, 247 P. 181 (1926).

The debtor has no valid ground to complain of the appointment of a receiver. If the debtor has property subject to the payment of the debt, it ought to be applied to it. The purpose of the law in cases of this nature is to afford the largest and most thorough means of scrutiny to reach the property that ought justly to go to the discharge of the debt. *Coates Bros.* v. *Wilkes*, 92 N.C. 376, 380-381 (1885).

The foregoing principles are firmly supported by a wealth of authorities and petitioner cites no cases to the contrary.

As held by the court below, the selection of the receiver rests largely within the discretion of the Chancellor (Pet. Addendum B, pp. A35-A36).

We submit that the receivership is correct and proper in all respects, that the receiver has given adequate bond, the receiver must function under the direction and supervision of the trial court, and if, at any time, the receiver should act in excess of his powers, the defendant may apply to the trial court for appropriate relief in an appropriate proceeding.

The receivership does not present any federal question whatsoever. Most certainly it does not present any question warranting review by this Court.

II.

The Decision Below Accords with and Is Not in Conflict with Prior Decisions of this Court.

In a preceding subdivision of this brief we have shown that the decision of the court below correctly applies the rules of estoppel and waiver announced in prior decisions of this Court. See pages 17-26, *supra*.

In a strained effort to create a conflict of decisions, Morgan asserts that the decision below is based on Section 2275 of *Wigmore on Evidence* (McNaughton Revision 1961); that Section 2275 is based upon *U. S.* v. *Field*, 193 F.2d 92 (C.A. 2, 1951); and that *Field* is in conflict with *Curcio* v. *U. S.*, 354 U.S. 118 (1957). Thus Morgan implies that the decision below conflicts with *Curcio* (Pet. p. 5). This is an erroneous and misleading argument.

In the first place, the decision below is not based solely on Section 2275 of Wigmore but on the facts of this case and on the principles of estoppel and waiver laid down in cases such as *Shepard* v. *Barron* and *Zap* v. *U. S.*, heretofore discussed.

In the second place, the basic principles set forth in Section 2275 of Wigmore long antedate and are in no way dependent upon *Field*. In the very first edition of his work, which was published in 1904 and 1905, Dean Wigmore states that the rule announced in Section 2275 has been "*the doctrine since the origin of the privilege.*" *Wigmore on Evidence* (1st Ed. 1905), § 2275, pp. 3150-3151. The third edition of Wigmore (1940) is to the same effect.

The 1961 McNaughton edition of Wigmore merely cites the *Field* case in a footnote as being in "Accord" with the text. That footnote is based on the simple fact that an earlier edition of Wigmore (the 1940 edition) was cited with approval in *Field* at page 100 of 193 F.2d.

In the third place, Morgan neglects to inform the Court that *Curcio* did not in any way repudiate, criticize, or even mention the rule set forth in Section 2275. Morgan also neglects to inform the Court that *Curcio* did not mention, discuss, or in any manner approve the dissent in *Field*.

Furthermore, *Curcio* did not involve express written contracts such as those involved in the present case. *Curcio* did not involve affirmative acts and the other elements of estoppel that are involved here. *Curcio* merely involved the *implied* obligation of a *custodian of records* that results from his assumption of the duties of custodian.

Curcio involved criminal contempt proceedings resulting from a witness's refusal to give oral testimony at a grand jury investigation of union racketeering. The Court merely held that although a custodian of records could not invoke the privilege insofar as *production* of the records themselves was concerned, he could invoke the privilege in response to certain questions concerning the whereabouts of the records.

In *Curcio* the Government relied on one statement contained in *Field* at page 97 of 193 F.2d. That statement did not relate in any way to Section 2275. In response to the Government's contention, the Court in *Curcio* made the statement quoted at the top of page 25 of Morgan's petition. That quotation clearly and unmistakably shows that in *Curcio* the Court merely said that the cases cited in *Field* on page 97 of 193 F.2d "in which a *custodian* was compelled to *identify* records . . ." did not support Judge Clark's statement on page 97 of 193 F.2d to the effect that "questions pertaining to the location of the records were proper under the precedents."

The two Second Circuit cases referred to in footnote 6 of *Curcio* likewise dealt only with a *custodian's* duty to

give oral testimony concerning the location and contents of corporate records.

It is therefore crystal clear that *Curcio* does not in any way conflict with the decision of the Mississippi Court.

Curcio does not conflict in any way with the principles of estoppel and waiver established by the decisions of this Court and applied by the court below in the instant case. In no way does *Curcio* detract from the vitality and validity of *Shepard* v. *Barron,* and *Zap* v. *U. S., supra.*

Likewise, none of the other cases cited by Morgan is in conflict with the decision below. None of them involved voluntary express written contracts of the type that are involved here. None of them involved unconditional and express agreements to indemnify and to furnish financial information upon request.

In no case cited had a party to civil litigation bound himself by unconditional agreements and representations in order to induce action by the other party. None of the cases cited involved an estoppel resulting from affirmative acts of the party that would make recognition of the privilege unjust and unconscionable.

None of the cases cited is contrary to the decisions of this Court upon which the Mississippi court relied.

We submit that the court below correctly held that Morgan has waived and is estopped to invoke the privilege as an excuse for refusing to disclose his assets as he had voluntarily and unconditionally bound himself to do.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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